SUPREME COURT, U. S.
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No. 71-1124

In the Supreme Court of the United States

OCTOBER TERM, 1971

J. F. LIDDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. D 11a-17a) is not reported. The opinion of the court of appeals (Pet. App. F 19a-30a) is reported at 448 F. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1971 (Pet. App. F 19a). A petition for rehearing was denied on October 29, 1971 (Pet.

App. G 31a). By orders dated January 31, 1972, and February 29, 1972, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 4, 1972. The petition was filed on March 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the jury's finding that petitioner was a responsible person who willfully failed to collect and pay over income and social security taxes withheld from the wages of employees of a corporation, thus making him liable under Section 6672 of the Internal Revenue Code of 1954 for a penalty in the amount of the unpaid taxes.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the Appendix to the petition (pp. 32a-33a).

STATEMENT

Petitioner was a 50 percent shareholder and director of Jax Construction Company (Jax) from its organization in 1961 until he sold his interest in early February, 1963. Commencing in early 1962, he was also a Jax employee, drawing a salary of $125 per week. During the fourth quarter of 1962, federal income and social security taxes were withheld from the wages of Jax's employees, but most of these funds (totalling $21,037.28) were not paid over by the cor-

poration to the government. Consequently, after exhausting all collection efforts against Jax and its debtors, the Internal Revenue Service made a 100 percent penalty assessment against petitioner under Section 6672 of the Internal Revenue Code of 1954, based upon the fact that he was a responsible person who willfully failed to collect and pay over the withheld taxes during the period in issue. (Pet. App. F 20a, 22a-23a, 27a-28a.)

Petitioner's duties at Jax were primarily related to the purchasing of equipment, the construction of an office, and the securing of financing. He was given broad authority to execute contracts, arrange loans and draw on corporate funds, and was one of only two persons at Jax's home office with the authority to sign checks and make withdrawals from the corporate bank account. The other person vested with such authority was J. C. Williams, an office manager, who previously had been employed by petitioner as a bookkeeper. Petitioner hired Williams to work at Jax, and Williams left the company about a month after petitioner sold his interest. (Pet. App. F 22a-23a.)

At trial before a jury, petitioner testified that he was aware that withheld taxes were due and owing to the government and that, while the taxes remained unpaid, he and other Jax employees continued to draw their salaries (R. 136-137, 141-142;[1] Pet. App. F 26a). He also knew that funds flowed in and out of

[1] "R." references are to the separately bound Appendix filed in the court of appeals. "Ex." refers to the exhibits introduced at trial.

the corporate bank account throughout the period in issue and into 1963 (R. 151-152; Ex. D-1; Pet. App. F 26a). Jax's bookkeeper testified that, during this period, it was petitioner who decided when and what corporate debts should be paid (R. 237-239, 242-247; Pet. App. F 26a).

After petitioner left Jax, the remaining directors, through an attorney, informed the Internal Revenue Service of the corporation's unpaid tax liabilities and advised the Service of several available Jax assets, including a claim against the Department of the Interior. Collection efforts were left up to the government, and no request or direction was made to apply the funds in any particular manner. The Service subsequently levied upon certain assets and applied the funds toward Jax's various delinquencies. Liabilities for the first two quarters of 1963 and a portion of the liabilities for the fourth quarter of 1962 were extinguished. There remained an unpaid balance for the period in issue in the amount of the assessment made against petitioner. (R. 70-71; Pet. App. D 13a-14a; Pet. App. F 27a-28a.)

Petitioner paid $22.34 of the assessment and brought this suit for refund. The government counterclaimed for the balance of the assessment. After a jury trial, at which petitioner took no exceptions to the instructions given by the court, a special verdict was returned that petitioner was a responsible person who willfully failed to collect and pay over the withheld taxes. (Pet. App. D 12a, 14a-15a; Pet. App. F 19a-20a, 28a.)

Thereafter, the district court denied petitioner's post-trial motions for judgment notwithstanding the verdict, or, in the alternative, a new trial. It held that the jury's findings were supported by the evidence and rejected petitioner's argument that the penalty assessment was illegal because the government had misapplied the funds collected by levy. (Pet. App. D 11a-17a). On appeal, the Fifth Circuit affirmed, holding that there was ample evidence to support the jury's verdict (Pet. App. F 26a-27a). It further held that the Internal Revenue Service had not misapplied the funds collected from Jax's creditors, and that the district court had properly instructed the jury with respect to the burden of proof and the question of willfulness (Pet. App. F 27a-29a).

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review.

1. Section 6672 of the Internal Revenue Code of 1954 provides that a responsible corporate official who willfully fails to collect and pay over income and social security taxes which the corporation has withheld from the wages of its employees shall be "liable to a penalty equal to the total amount of the tax * * * not collected, or not accounted for and paid over" to the government. The special verdict of the jury that petitioner was a person responsible for paying over the taxes withheld from Jax employees during the period in issue and that he willfully failed to do so is amply supported by the evidence.

Petitioner suggests (Pet. 3, 8-9, 12) that he possessed only a general power of attorney to act on behalf of the corporation and had no duty to collect and pay over withheld taxes. The evidence reveals, however, that he was one of only two persons at Jax's home office who was authorized to sign checks, and the other was "his righthand man" (Pet. App. F 26a). Petitioner's further suggestion (Pet. 13-14, 16-17) that his failure to collect and pay over the withheld taxes was not willful is also factually incorrect. According to the evidence he was aware of the obligation to collect and pay over the withheld taxes, and he knew that while the taxes remained unpaid, funds were flowing in and out of the corporate bank account to meet payroll and other obligations (R. 136-137, 141-142; Pet. App. F 26a). At all events, if there were conflicts in the testimony, the jury resolved them against petitioner. The court of appeals, after reviewing the entire record, properly sustained the verdict, and its resolution of this factual issue does not warrant further review.

2. Generally, those "high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds" are responsible persons under Section 6672. *Monday* v. *United States*, 421 F. 2d 1210, 1214-1215 (C.A. 7), certiorari denied, 400 U.S. 821. Exclusive control over all corporate affairs need not be vested in only one official, and there can be more than one "responsible" officer, each of whom is jointly and severally liable

for a Section 6672 penalty. *Braden* v. *United States*, 442 F. 2d 342 (C.A. 6), certiorari denied *sub nom. Bonistall* v. *Braden*, 404 U.S. 912. A responsible person has acted "willfully" under Section 6672 if he voluntarily, consciously and intentionally elects to use withheld taxes—which constitute a special fund in trust for the United States (Section 7501(a))—for other corporate purposes. *Newsome* v. *United States*, 431 F. 2d 472 (C.A. 5); *Monday* v. *United States*, *supra*. The district court's charge to the jury was in line with these settled principles, and petitioner took no exceptions to the instructions. His assertions (Pet. 15-17) that the courts below applied an erroneous legal standard on the issues of "duty" and "wilfulness" are both mistaken and untimely.

Contrary to petitioner's argument (Pet. 16-17), "reasonable cause" is not a proper consideration in determining willfulness. See *Monday* v. *United States*, *supra*; *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803. The district court in the instant case, nevertheless, referred to "reasonable cause" in its instructions (see Pet. App. A 7a), so that petitioner has no cause for complaint. Moreover, what petitioner alleges as reasonable cause for his willful failure to pay over the withheld taxes—that he expected payment of the taxes from another source—is not even supported by the record. Under these circumstances, petitioner's claim (Pet. 16) that the court of appeals failed to consider the effect of "reasonable cause" is inapposite to the resolution of this case.

3. Petitioner's contention (Pet. 17-18) that he is not liable for the penalty because Jax's trust fund

taxes were offset by Jax's claim against the government is also unfounded. Apart from the fact that the offset question was never raised in the trial court, there is no evidence that Jax had any liquidated claim against the government during the period in issue. The Internal Revenue Service was not even able to levy upon Jax's claim against the Department of Interior until a year after petitioner severed his connection with the corporation (Pet. App. F 27a). In any event, a responsible officer's liability is separate and distinct from that of the corporation, and the Service was not required to exhaust its remedies against Jax before proceeding against petitioner. *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803; *Singer* v. *District Director of Internal Revenue*, 354 F. 2d 992 (C.A. 2).

Nor was there any impropriety in the Service's application of the funds it collected from Jax's creditors. Where, as here, no request is made to apply involuntarily paid funds in any particular manner, the Service may apply the funds as it sees fit. *Monday* v. *United States, supra; Datlof* v. *United States*, 370 F. 2d 655 (C.A. 3), certiorari denied, 387 U.S. 906; *Hewitt* v. *United States*, 377 F. 2d 921, 925 (C.A. 5). By applying the funds to the debts of the corporation which were least likely to be collected, the Service acted as any creditor would have in the same situation. See *Nat. Bank, etc.* v. *Mechanics' Nat. Bank*, 94 U.S. 437.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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